U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: EAC 01 030 53325 Office: VERMONT SERVICE CENTER Date: FEB 27 2003

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Texas in 1996 and is authorized to conduct business in the State of New York. It is engaged in wholesale marketing of specialty meats to area restaurants and stores. It seeks to employ the beneficiary as its general manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary's duties had been or would be primarily executive or managerial in nature.

On appeal, counsel for the petitioner asserts that the beneficiary manages the company and manages the marketing function. Counsel also references the previous approval of the beneficiary as an L-1A beneficiary. Counsel also asserts that the denial of this petition is a violation of due process.

Section 203(b) of the Act states, in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act

as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the beneficiary has been and will be primarily performing managerial or executive duties.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-
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> i. manages the organization, or a department, subdivision, function, or component of the organization;
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> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
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> iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily-
>
> i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

It is noted that the petitioner requests consideration for the beneficiary's classification as a general manager. However, the petitioner also alludes to several elements found in the definition of executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if the petitioner is representing the beneficiary is both an executive and a manager.

In a letter submitted with the initial petition, the petitioner stated that the beneficiary would be employed in an executive and managerial capacity with the following functions:

1. Vested with the discretionary authority to handle the daily operations of the company;
2. To delegate tasks [sic] assignments, and responsibilities to subordinate managers and workers as needed;
3. Authority to formulate, establish, amend, and abolish any policies as she sees fit;
4. Authority to challenge and override orders from subordinate managers;
5. To increase the operating efficiency of the company;
6. To train and instruct subordinate managers and employees;
7. To report all progress to superiors;
8. To attend advance management seminars;
9. To represent the company at social functions;
10. To establish goals, objectives, and deadlines for the company;
11. To assist in the hiring, firing, promotions, transfer, and dismissal of company personnel.

The petitioner also provided examples of the beneficiary's performance of the above job duties including moving the company from its Texas location to New York, diversifying the company's business, creating a sales staff, seeking commissioned sales staff, and identifying a market niche.

The petitioner further provided a copy of its Texas Franchise Tax

Public Information Report for the year 2000. The report reflects a president, the beneficiary as vice-president, and a corporate secretary.

The director requested complete position descriptions for all of the petitioner's employees, including the beneficiary. The director also requested a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis. The director further requested copies of the petitioner's Internal Revenue Service (IRS) Forms 941, Employer's Quarterly Tax Returns, Forms 1099, Miscellaneous Income, and Forms W-2, Wage and Tax Statements for the year 2000.

In response to the director's request the petitioner provided additional examples regarding the beneficiary's duties. The petitioner added that the beneficiary signed checks, leases, and tax returns on behalf of the company, assigned tasks and sales territories, set prices, hired contractors, conferred daily with the sales manager and representative on pricing and marketing, met with clients and prospective businesses, broadened the sales and distribution network, and spent a significant portion of her time planning marketing and pricing policies.

The petitioner also provided its IRS Form 941 for the last quarter of 2000 revealing three employees including the beneficiary. The petitioner in its response also stated that it had no formal contract with contractors. The petitioner explained that it relied upon its supplier to separate orders and make deliveries. The petitioner also provided its IRS Form 1120 for the year 2000. The IRS Form 1120 revealed gross receipts in the amount of $448,210, compensation to two officers in the amount of $21,000, salaries paid in the amount of $11,000, and net income in the amount of $5,849.

The director determined that the description of the duties of the petitioner's staff was insufficient to establish that the beneficiary's position would be managerial or executive in nature. The director noted specifically that the petitioner had not provided a description of duties for its staff other than for the beneficiary. The director determined that the petitioner had not demonstrated that the United States entity was functioning at a level that would require the services of an individual primarily engaged in executive or managerial activities. The director concluded that the record did not support a finding that the beneficiary would be employed in a managerial or executive capacity or that the petitioner could support such a position.

On appeal, counsel for the petitioner asserts that the beneficiary is a manager of an essential function of the organization. Counsel also references the previous L-1A approvals of this beneficiary and asserts that an employee of a small business may be properly accorded "L-1A" status. Counsel further asserts that the denial of this petition violates due process. Counsel finally submits a

description for each of the petitioner's three employees including an estimate of the number of hours spent on each task.

Upon review, counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner initially provided a generalized list of the beneficiary's areas of responsibility for the company including several paraphrases of elements of the statutory definitions of managerial and executive capacity. *See* section 101(a)(44)(A)(ii) and (iv) and section 101(a)(44)(B)(ii) and (iii) of the Act. The petitioner then provided examples of the beneficiary's performance of the listed responsibilities including moving the company from its Texas location to New York, diversifying the company business, creating a sales staff, seeking commissioned sales staff, and identifying a market niche. The recommendation of the beneficiary to the petitioner to seek a different sort of business in a different location is not sufficient to establish that the beneficiary primarily serves the petitioner in a managerial or executive capacity. There is no evidence that the beneficiary performs this type of duty on an ongoing primary basis.

The petitioner's added information that the beneficiary signed checks, leases, and tax returns on behalf of the company does not significantly contribute to the beneficiary's eligibility for this classification. These duties demonstrate that the beneficiary is authorized to act as an agent on behalf of the company but does not demonstrate that these duties are primarily managerial or executive in nature. As one of only three employees, the company necessarily must designate someone to perform these tasks. The petitioner's statement that the beneficiary also assigned tasks and sales territories, hired contractors, conferred daily with the sales manager and representative on pricing and marketing are indicative of an individual acting in a first-line supervisory position of non-professional employees. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional. *See* section 101(a)(44)(A)(iv) of the Act. Furthermore, the petitioner has not provided evidence that it has actually hired contractors. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner's indication that the beneficiary meets with clients is indicative of an individual providing basic sales services for the company. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Likewise, the beneficiary's duty of planning marketing and pricing policies is indicative of an

individual providing the marketing research to price the goods necessary for the company to continue its operations.

Counsel's submission of a description for each of the petitioner's three employees including an estimate of the number of hours spent on each task on appeal does not contribute to a finding that the beneficiary is engaged primarily in managerial or executive duties. First, where the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The director clearly requested this information and it was not forthcoming. Second, even if the hourly breakdown of the beneficiary's duties is considered on appeal, the beneficiary appears primarily responsible for confirming orders, setting prices and providing market research. As discussed above, the beneficiary is performing these duties rather than performing the executive or managerial duties related to these duties.

Counsel's assertion that the beneficiary is managing a function is also not persuasive. Counsel's contention that the beneficiary manages the marketing function rather than performing the duties necessary to carry out the function is not supported by the record. The record demonstrates that it is the beneficiary who is responsible for carrying out the marketing function.

Counsel's implication that the past approval of the beneficiary's L-1A nonimmigrant visa classification should require the approval of this petition is noted. However, if the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in this petition, the approval would constitute clear and gross error on the part of the Service. As established in numerous decisions, the Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. *See, e.g., Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert denied* 485 U.S. 1008 (1988); *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (BIA 1988).

Counsel's assertion that the Service's denial of the petitioner's petition is a violation of due process is without merit on this appeal. The Administrative Appeals Office, like the Board of Immigration Appeals, is without authority to apply the constitutional doctrine of due process so as to preclude a component part of the Service from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). An alleged violation of due process is a form of relief that is available only through the courts. The jurisdiction of the AAO is limited to that authority specifically granted to the AAO, through

the regulations at 8 C.F.R. § 103.1(f)(3)(iii). Accordingly, the Service has no authority to address the petitioner's due process claim.

It is not possible to discern from the petitioner's description of the beneficiary's responsibilities regarding daily operations of the petitioner that the beneficiary is performing managerial or executive duties with respect to these activities rather than actually performing these activities. It appears that many of the beneficiary's tasks relate to the performance of services for the petitioner as a first-line supervisor. The petitioner's description of its employee's job duties does not support a finding that the beneficiary directs the management of the petitioner or actually directs other managers. The record contains insufficient evidence to demonstrate that the beneficiary duties in the proposed position will be primarily managerial or executive in nature. The record does not sufficiently demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Rather, the description of the duties to be performed by the beneficiary are more indicative of an individual primarily performing the basic operations of the petitioner. Further, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive title. The petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has not established that a qualifying relationship exists between the petitioner and the claimed foreign entity. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities, in that the petitioning company is the same employer or an affiliate or subsidiary of the overseas entity. The petitioner has provided confusing information on this issue. The petitioner claims that it is affiliated with a Chinese company, the beneficiary's employer overseas. The petitioner provides copies of two stock certificates issued to two individuals in the amount of 60,000 shares and 40,000 shares respectively to establish its ownership. However, the petitioner's Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return identifies a Chinese foreign company as an owner of 25 percent or more of the petitioner. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). The

petitioner's reference that the legal representative of a Chinese company is considered the owner of the company is not sufficient to explain the discrepancy between the owner's of the share certificates and the information submitted on the petitioner's IRS Form 1120. As the appeal is dismissed for the reason stated above, this issue is not examined further.

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.